IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. T.S., B.D. 11/9/92, Appellant.	)	No. 61918-7-I DIVISION ONE UNPUBLISHED OPINION FILED: August 10, 2009

Grosse, J. — The admission of evidence of the fact of an out-of-court complaint by a victim of a sexual assault, if relevant, is not necessarily error. Here, the trial court's admission of evidence of the fact of the victim's complaint of sexual assault to his parents was not an abuse of discretion. Any issue as to the timeliness of the victim's complaint went to the weight of that evidence. Moreover, any error in the admission of the evidence was harmless given that the victim testified at trial and that testimony was corroborated. We affirm the trial court.

FACTS

T.S., born November 9, 1992, was charged with one count of first degree rape of a child. The victim was T.S.'s younger brother, T.J. Prior to trial, the State moved to admit T.J.'s disclosures to his parents under the fact of complaint exception to the hearsay rule. T.S. objected on the ground that T.J.'s complaint was made over a year after the incidents and thus was not timely. The trial court ruled that evidence of the fact of T.J.'s complaint was admissible, but not

evidence of the details of his complaint.

In April 2006, while both T.S. and T.J. were living with their mother, Wendy Spicer, and her boyfriend, Wendy arranged to work the graveyard shift so she could be home while her sons were out of school on spring break. She would nap during the day while working the graveyard shift. One of the days she was working the graveyard shift and trying to nap, Wendy heard her sons roughhousing or wrestling in T.S.'s bedroom. She opened the door to the bedroom and saw both boys underneath the covers on T.S.'s bed. She asked what was going on, and T.S. said they were just playing around.

Around the same time, Wendy left town to visit relatives in West Virginia. While there, she received a telephone call from T.J. T.J. was very upset and told Wendy he did not want to live at the house anymore and wanted to live with his father. He did not tell his mother why, however, except to say he did not like it at her house anymore. When Wendy returned from West Virginia, T.J. told her he had changed his mind about wanting to move to his father's house.

Wendy noticed that after she returned from West Virginia, T.S. seemed more agitated and was more easily upset, and T.J. was more obstinate and got in trouble at school more frequently.

T.S moved in with his father, Jeffrey Spicer, for about a month in June 2006. But after a motor home trip with both T.J. and T.S., Jeffrey returned the boys to Wendy's house, telling her they were rude and disrespectful and that he never wanted to see them again. After this, T.S. and his mother began having

frequent arguments and, in November 2006, T.S. moved back in with his father and lived there continuously until trial. Wendy testified that before T.S. moved out, she had a very close relationship with him, and that T.S. and T.J. had a typical sibling relationship; after T.S. moved out, her relationship with him became distant as did T.S's and T.J.'s relationship. After T.S. moved out of Wendy's house, her relationship with T.J. was peaceful.

Wendy testified that on a Sunday afternoon in mid to late July 2007, while she and T.J. were cleaning up homework and were about to start dinner, T.J. "just all [of a] sudden started talking" and told her about the assaults. T.J. was calm and identified who had assaulted him. Wendy testified that T.J. was not crying and seemed eager to talk, but reluctant to go into detail. She told Jeffrey about T.J.'s allegations. She, Jeffrey, and T.J. met and T.J. again told of the assaults. Jeffrey testified that T.J. was crying and reluctant to talk. After this conversation, Wendy called Child Protective Services.

T.J. testified at trial that T.S. "did wrong thing[s]" to him. Regarding the day Wendy walked in on the two boys in T.S.'s bedroom, T.J. testified that, at the time, his pants and underwear were pulled down, and T.S. had wiped his penis on T.J. and put it into T.J.'s mouth. He testified that this happened a second time on another day. On the second occasion, T.S. also put his penis into T.J.'s anus. T.J. testified that he did not tell his mother right away because he didn't want to get his brother in trouble. A comment from Wendy's boyfriend, that a man is not gay unless he "put[s] it in [his] mouth" prompted T.J. to tell his

mother about what happened with his brother.

The State charged T.S. with one count of first degree rape of a child. The court found him guilty as charged.

ANALYSIS

We review a trial court's decision whether to admit or exclude evidence for abuse of discretion.[1] The improper admission of evidence constitutes reversible error only if it materially affects the outcome of the trial.[2]

The fact of complaint doctrine allows the prosecution, in criminal trials involving sex offenses, to present evidence in its case in chief that the victim made a timely complaint to someone of the assault.[3] Evidence of the details of the complaint, including the identity of the offender and the nature of the act, is not admissible under the fact of the complaint doctrine.[4] Any evidence beyond the fact of the complaint "is hearsay of the most dangerous character."[5] Accordingly, the victim or the person to whom the victim made the complaint may testify that the victim made the complaint after the assault, as well as where, to whom, and under what circumstances the complaint was made.[6] However, no witness may testify about the circumstances or details of the assault.[7]

---

[1] State v. Iverson, 126 Wn. App. 329, 336, 108 P.3d 799 (2005).
[2] State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993).
[3] State v. Ferguson, 100 Wn.2d 131, 135, 667 P.2d 68 (1983); State v. Ackerman, 90 Wn. App. 477, 481, 953 P.2d 816 (1998); State v. Alexander, 64 Wn. App. 147, 151, 822 P.2d 1250 (1992).
[4] Ferguson, 100 Wn.2d at 135-36; State v. Smith, 3 Wn.2d 543, 550, 101 P.2d 298 (1940).
[5] State v. Hunter, 18 Wash. 670, 672, 52 P. 247 (1898).
[6] Smith, 3 Wn.2d at 550.
[7] Smith, 3 Wn.2d at 550.

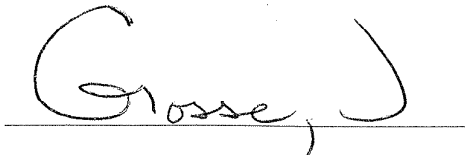
Here, the trial court reasoned: "I think it is harmless to allow testimony that there was a disclosure made. It provides background for the investigation, and I think there's no dispute that a disclosure was made." The court's characterization of the admission of the testimony as "harmless" was inartful. A trial court does not engage in a harmless error analysis; that is the job of an appellate court. We believe that a more accurate characterization of the trial court's reasoning in admitting evidence of the fact of T.J.'s complaint was that the delay between the assaults and T.J.'s complaint was not untimely and the evidence was material and relevant. We agree with the trial court. Evidence of the fact of T.J.'s complaint to his parents was not hearsay and was relevant, albeit only marginally relevant given that T.J. testified as to the assault at trial. The timeliness of the complaint went to the weight of the evidence, not its admissibility. Further, as the trial court noted, there was no dispute that T.J. complained to his parents. The trial court did not abuse its discretion in admitting evidence of the fact of T.J.'s complaint.

Even if we found the trial court abused its discretion, any error was harmless. An error is harmless if it does not materially affect the outcome of the trial.[8] Here, the victim T.J. testified regarding the assault. The trial court found T.J.'s testimony "completely credible." Moreover, that testimony was corroborated by the mother's testimony. The evidence of guilt is overwhelming, and the admission of evidence about the fact of T.J.'s complaint to his parents did not materially affect the outcome of the trial.

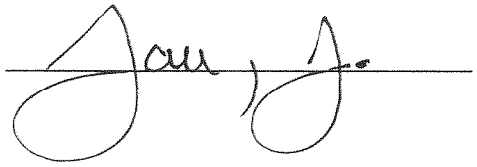
[8] Halstien, 122 Wn.2d at 127.

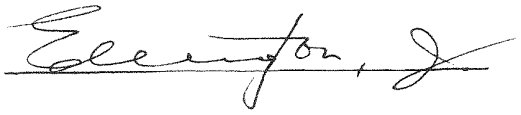
T.S. also argues that the State violated the trial court's pretrial ruling by eliciting evidence that T.S. was the perpetrator by asking T.J.: "At some point did you tell your mom what [T.S.] did?" We note, first, that T.S. failed to object to the State's question and waived any possible error.[9] Moreover, there is no dispute over the identify of the offender and thus any harm that may have been caused by any reference to T.S.'s identity was "too slight to constitute reversible error."[10] The issue here is what T.S. did or did not do. Accordingly, admission of evidence of T.S.'s identity under the fact of the complaint doctrine, if error, was harmless and is not grounds for reversal.[11]

We affirm the trial court.



WE CONCUR:





[9] State v. Davis, 141 Wn.2d. 798, 850, 10 P.3d 977 (2000) ("Without an objection, an evidentiary error is not preserved for appeal.").
[10] Ferguson, 100 Wn.2d at 136.
[11] State v. Conklin, 37 Wn.2d 389, 391, 223 P.2d 1065 (1950).